

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN E. WILKINSON, JR.**  
Claimant

VS.

**HAMM ASPHALT, INC.**  
Respondent

AND

**ZURICH AMERICAN INSURANCE CO.**  
Insurance Carrier

Docket No. 1,053,269

**ORDER**

Respondent and its insurance carrier (respondent) request review of the December 13, 2010 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

**ISSUES**

Claimant alleges he injured his back on October 6, 2010, while shoveling asphalt for respondent. Citing specific testimony from one of claimant's supervisors, Richard Taylor, the ALJ held that (1) claimant injured his back in an accident that arose out of and in the course of his employment and (2) claimant provided respondent with timely notice of that accident. Consequently, the ALJ awarded claimant both temporary total disability benefits and medical benefits. The ALJ held in pertinent part:

Richard Taylor, the asphalt superintendent, testified that he was notified by claimant on the job site near or on the Kansas Turnpike, that claimant "wrenched his back shoveling or something" on the job site. This conversation centered around claimant's request for some type of back brace or support. Mr. Taylor specifically testified that he needed to get claimant to medical attention, and to complete paperwork, if claimant sustained an accident on the job. Claimant declined this offer of medical assistance, and declined filling out the necessary

paperwork to process a possible workers' compensation claim. Mr. Taylor further testified that claimant was not sure his injury happened at work.

Based upon the foregoing, the claimant failed to properly indicate on medical forms that he had sustained his injury while at work. Further, the testimony of claimant is sometimes difficult to track, regarding the circumstances and events surrounding the alleged accident. However, the testimony of Richard Taylor clearly indicates that claimant sustained some type of injury to his back while on the job. This conversation and injury is supported by the testimony of both claimant and Mr. Taylor regarding claimant's request for some type of back brace or support while on the job site. Accordingly, the Administrative Law Judge finds as more probably true than [sic] not true that claimant did sustained [sic] an accidental injury arising out of and in the course of his employment with respondent in October of 2010, the approximate date being October 6, 2010.<sup>1</sup>

Respondent challenges the ALJ's findings. Respondent acknowledges it knew claimant was experiencing back pain at work and that claimant reported that "he must have wrenched it shoveling or something."<sup>2</sup> But respondent argues claimant also declined "to make out a paper for workers' comp"<sup>3</sup> when offered the opportunity and that indicated claimant's injury did not occur at work. Moreover, respondent contends that claimant told human resources manager, Brad Hern, that he hurt his back at home. In addition, respondent argues that Dr. William A. Bailey's records from October 26, 2010, indicate that claimant hurt his back at home while lifting and that claimant listed his private insurance carrier as the responsible party when he completed the doctor's forms. Likewise, respondent argues that claimant did not tell his chiropractor, Dr. Rodrock, that he hurt his back at work.

Respondent contends that Mr. Hern did not learn that claimant was alleging a work-related injury until either late October or early November 2010, which was shortly after claimant's application for unemployment benefits had been denied and after claimant had learned a significant portion of his medical bills would not be paid by private insurance.

In short, respondent contends claimant's back injury occurred at home on October 6, 2010, rather than at work, and that claimant failed to provide timely notice of being injured at work. Accordingly, respondent requests that the Board reverse the December 13, 2010, Order.

Claimant argues, in essence, that his reticence in claiming workers compensation benefits should not be construed as an admission that he injured his back somewhere

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<sup>1</sup> ALJ Order (Dev. 13, 2010) at 2.

<sup>2</sup> Respondent's Brief at 3 (filed Jan. 10, 2011).

<sup>3</sup> *Id.*

other than work. He alleges that it is not uncommon for his back to hurt due to the hard work he performed for respondent, but that on October 6, 2010, he began experiencing excruciating pain at work. Claimant specifically denies injuring his back at home, but acknowledges sending a note to Dr. Bailey that stated he was not certain if his pain started at home or work. Additionally, claimant denies telling Mr. Hern that the back injury occurred at home, but remembers telling Mr. Hern that he did not know if the injury happened at home but his back went out on him at work.

Claimant also maintains an incident at work on October 6, 2010, caused symptoms consistent with an acute injury that were unlike those he had previously experienced. He asserts he overcame his reticence in making a claim for workers compensation benefits when his symptoms did not improve and after learning it was impractical for him to handle his medical bills and loss of income on his own. Furthermore, claimant suggests there was confusion as to whether he had to be absolutely certain that his injury occurred at work and that an injury had to be entirely caused by work before it was appropriate to claim or receive workers compensation benefits. Finally, claimant argues that in the event the conversation he had with his supervisor within two days of the alleged accident did not constitute notice of the accident, the period for providing notice was extended to 75 days under the just cause provision of K.S.A. 44-520.

In summary, claimant argues the only reasonable conclusions in this claim are that he injured his back at work on October 6, 2010, and that he provided respondent with timely notice. Consequently, claimant requests the Board affirm the preliminary hearing Order.

The issues before the Board on this appeal are:

1. Did claimant injure his back at work on October 6, 2010, in an accident that arose out of and in the course of his employment with respondent?;
2. If so, did claimant provide respondent with timely notice of the accident?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant, who is approximately 40 years old, began working for respondent, an asphalt company, in approximately June 2010. Although hired as an equipment operator, claimant spent a considerable portion of his time shoveling asphalt. He testified in part:

I was hired in as an operator but I did more shoveling than I did running equipment. So I shoveled and basically what I did is stayed behind the asphalt

thing and when there was a hole, get a shovel and pick up 30, 35 pounds of asphalt and throw it in the hole.<sup>4</sup>

In October 2010, respondent was working on streets in McClouth, Kansas. That work, according to claimant, required a lot of shoveling. Claimant testified that on Wednesday, October 6, 2010, he experienced excruciating pain while shoveling. He describes the incident and his symptoms before the incident as follows:

Well, when you do that line of work, you always wake up and you're always feeling like somebody whooped you, you know, because it's hard work. Yeah, I've always felt like my back hurt but some Sunday I woke up and I was a little stiff and I didn't think nothing about it. I went to work Monday, Tuesday, Wednesday, and I was shoveling and I just remember I went with the shovel in between the hole and I just felt excruciating pain. It just hit me like somebody hit me with a sledgehammer in the back. And then all of a sudden my lower back kind of felt real weird and I had real sharp pains going down my leg.<sup>5</sup>

Claimant told co-workers about his back pain and modified his work activities for the remainder of the day. Claimant believed he "kind of kinked it [his back] a little bit" and that he "would be all right the next day."<sup>6</sup>

Claimant testified he told supervisor and asphalt superintendent, Richard Taylor, about his back pain the next day. Claimant explained:

Well, once again, somewhere around the noon-ish time I went and talked to Richard and I asked Richard about getting me a back brace and he said he would call the safety guy.

. . .

Yeah. I told him Wednesday when we were in McClouth that I kind of threw my back out of place, and we started talking because I guess he went through this ordeal and he told me, he said -- he started talking to me about his ordeal and then he said, well, I'll check in my truck and see if I've got an extra belt. He said, but otherwise I'll get a hold of the safety guy, and I said okay.

Well, meanwhile we were talking and he was telling me about his incident about, yeah, he should have drawn it under workers' comp and all this, but he never did. He went ahead and took care of his own ordeal. And he asked me, do I want him to make out a paper for workers' comp. And I said no. I said, I think what it is

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<sup>4</sup> P.H. Trans. at 5.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> *Id.* at 7.

right now, I think it's just tweaked and I'd just like to leave it alone right now. That's basically what I told him.<sup>7</sup>

Mr. Taylor does not dispute that on October 7 or 8, 2010, claimant told him that he had wrenched his back shoveling or something and that he wanted a back brace or support.<sup>8</sup> Mr. Taylor also testified, however, that he told claimant they needed to report the problem and have claimant examined. But claimant declined and indicated he was not certain his symptoms were related to work. Mr. Taylor testified, in part:

Q. (Mr. Dorothy) Did he ever take you up on that offer [of medical examination]?

A. (Claimant) No, just the contrary. He said, no, I -- said, I'm -- I can't say with absolute certainty that it's happened here. I'm -- I'm not that way. I'm not going to tell you it happened here and --

Q. Okay. Did he ever tell you it happened at home?

A. He did not tell me that but that was -- I mean, like I say, when the guys are -- they have these mini-conversations between dumping trucks every five minutes and -- and between their deer stories, this, that, and the other, that was -- that was his story.<sup>9</sup>

Mr. Taylor maintains that he told claimant he should be examined and a report filed unless claimant could say "with 100 percent certainty it did not happen at work . . ."<sup>10</sup> Moreover, claimant allegedly indicated to Mr. Taylor that his back had been going out on him every year for the last two or three years but it would improve after a few days rest.

In addition, claimant maintains that on the day of his alleged accident he also told the 'go-to-guy' about his sharp back pain. Claimant testified the go-to-guy, Ryan Carver, was in charge when both Jeff Hamm and Mr. Taylor were absent. Moreover, on Friday, October 8, 2010, two days after the alleged incident at work, claimant asked Mr. Carver to contact the safety man and inquire about the previously requested back brace. That Friday afternoon, claimant left work early after reporting to Mr. Taylor that he needed to leave work due to his back pain. That was the last time claimant worked for respondent.

Claimant sought chiropractic treatment and was told he had a bulging disk. But when his symptoms did not improve with chiropractic treatment, claimant contacted

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<sup>7</sup> *Id.* at 8-9.

<sup>8</sup> Taylor Depo. at 6.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 11.

respondent and inquired what respondent wanted him to do. Claimant spoke with Brad Hern, respondent's human resources manager, who told claimant a "woman in Topeka that works for workers' comp could hook me [him] up with a doctor."<sup>11</sup> Claimant also asked if respondent would lay him off so he could draw unemployment benefits and was told respondent had no problem with that.

The parties disagree as to what was said in that conversation. Mr. Hern maintains that claimant stated his back injury did not happen at work but it, instead, happened at home. Mr. Hern testified in pertinent part:

. . . He told me at that time that it happened at home on Sunday, that he could have filed it under work comp but he was not that kind of an individual. He said that -- he said, I'm not that kind of individual. I wouldn't do that. I wouldn't file it under work comp because it did happen at home. So I'm not going to do that but I just need some time off.<sup>12</sup>

Conversely, claimant testified that he told Mr. Hern that he did not know when his back pain commenced "but I do know that it did blow out on me at work and it came in my lower back and then went all the way down my leg where I could barely stand at all."<sup>13</sup>

Jennifer Wilkinson, claimant's wife, testified she overheard claimant's side of the telephone conversation and that claimant told Mr. Hern that he did not know if he had hurt his back at work or at home, but that it went out on him at work. Ms. Wilkinson also indicated that claimant was initially reluctant to report his back injury as he was afraid of losing his job. She also explained that claimant had experienced pain in his back before October 6, 2010, at both home and work, but that pain was unlike the pain he now experiences.

In any event, as a consequence of that conversation with Mr. Hern, claimant saw Dr. William A. Bailey, an orthopedic surgeon, on October 26, 2010. The doctor ordered an MRI, which indicated claimant had degenerative disk disease and nerve root compression at the L5-S1 intervertebral space and an annular tear at L4-5. The doctor diagnosed lumbar disc syndrome and recommended injections but also told claimant that he might require surgery. Concerned about the potential medical expense, claimant contacted Mr. Hern and inquired about filing a workers compensation claim.

The notes from the chiropractor, Dr. Jeremy Rodrock, do not indicate how claimant injured his back. But those records do indicate that claimant had begun experiencing

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<sup>11</sup> P.H. Trans. at 14.

<sup>12</sup> Hern Depo. at 5.

<sup>13</sup> P.H. Trans. at 19-20.

sharp pain in his low back since October 6, 2010. Claimant testified that he does not believe he told the doctor how he injured his back.

The records from Dr. Bailey's office indicate that claimant indicated his condition was not work-related. Claimant testified he indicated his back was not work-related as he did not want anybody knowing where the accident happened.<sup>14</sup> Moreover, the doctor's office notes from October 26, 2010, read in part:

This patient was doing some lifting at home on 10/6/10, which causes some back pain, and then after shoveling at work a few days later, the pain extended into the right posterior hip and down the leg. It is aggravated by coughing, by sitting, by twisting movements of his back.<sup>15</sup>

But claimant denies telling the doctor he was injured lifting at home. Claimant maintains that he told Dr. Bailey about experiencing sudden severe pain while shoveling at work. Indeed, the doctor's records include a letter from claimant dated November 3, 2010, in which claimant attempted to correct the history recorded by Dr. Bailey. Claimant wrote in pertinent part:

In looking at my medical records you sent, I noticed that you mis-stated what I reported to you regarding my injury. I indicated I'm not sure if my pain started at home or work, I just know I was hurting on Sunday and it continued to hurt until Wednesday Oct 6<sup>th</sup> when I felt like it blew out. I reported it then, but continued to work until Friday at 3 pm when I had to leave.<sup>16</sup>

On November 3, 2010, claimant received an epidural steroid injection. The history recorded in the related medical notes indicate that claimant had a sudden onset of sharp pain while shoveling at work.

Considering the above evidence, the ALJ found that claimant injured his back at work and that he provided respondent with timely notice of the accident. The undersigned Board Member agrees. The evidence establishes that claimant had low back symptoms before October 6, 2010, when he experienced a dramatic increase in low back symptoms and pain radiating into his leg. Likewise, the evidence establishes that he advised a supervisor of that incident within a day or two of when it occurred. Although claimant may have been reticent in claiming workers compensation benefits and somewhat equivocal in relating his symptoms to work, that may be partly explained due to having preexisting symptoms and due to a concern for his job. There is no question, however, that claimant's

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<sup>14</sup> *Id.* at 24.

<sup>15</sup> *Id.* Cl. Ex. 1 at 6 (Oct. 26, 2010 office note).

<sup>16</sup> *Id.* Cl. Ex. 1 at 3 (Nov. 3, 2010 letter from claimant).

symptoms significantly worsened on October 6, 2010, while shoveling asphalt and that MRI results later confirmed he has an annular tear and nerve root impingement.

In summary, claimant injured his back in an accident that arose out of and in the course of his employment with respondent and that he provided respondent timely notice of the accidental injury.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>17</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated December 13, 2010, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March 2011.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Sally G. Kelsey, Attorney for Claimant  
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge

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<sup>17</sup> K.S.A. 44-534a.